



September 7, 2016

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 16-41

Dear Ms. Dortch:

On Friday, September 2, the American Cable Association (ACA) responded¹ to a National Association of Broadcasters (NAB) ex parte² urging the Federal Communications Commission (FCC) to reject an ACA proposal that would permit MVPDs to redline their programming lineups, targeting Spanish-language channels and “urban-interest” channels.³ While most might expect ACA to simply withdraw its proposal after others observed its discriminatory intent and impact, ACA did not. ACA remains undeterred and is still pushing the FCC to seek comment on a rule that would restrict programmers from negotiating for carriage of Spanish-language and “urban interest” programming on rural systems.⁴

ACA’s main defenses of its redlining plan seem to be that this proposal was among many other proposals in the same letter and that its “broader advocacy” is not discriminatory. Neither point seems relevant or accurate. What’s more, ACA did not raise the proposed restriction for the first time in its August 26 ex parte, but rather as part of a continued effort to convince the FCC to permit such redlining. ACA complained of the burden of having to

¹ Letter from Michael Nilsson, American Cable Association, MB Docket No. 16-41 (Sept. 2, 2016) (ACA Response).

² Letter from Rick Kaplan, General Counsel and Executive Vice President, National Association of Broadcasters, MB Docket No. 16-41 (Sept. 1, 2016).

³ Letter from Michael Nilsson and Ross Lieberman, American Cable Association, MB Docket No. 16-41 (Aug. 26, 2016).

⁴ See ACA Response.

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negotiate regarding programming that does not reflect the “demographics” of a particular system in their initial comments⁵ and reply comments⁶ in this docket. It was not entirely clear what ACA meant by these statements until it filed the August 26 ex parte more explicitly urging the FCC to seek comment on rules to inhibit programmers from negotiating carriage of this diverse programming.

ACA also suggests that its proposal is somehow similar to the FCC rule requiring broadcast network affiliation agreements to contain a “right to reject” provision. Such provisions allow local network-affiliated stations to decide whether to preempt national network programming for other community-responsive programming – such as breaking news or coverage of a local political candidates’ debate.⁷ Broadcasters use this rule sparingly in order to provide programming on topics of local import, including weather emergencies, high school athletics,⁸ charity telethons⁹ and church services.¹⁰ Unlike ACA’s request, the rule was not enacted, nor is it utilized, for the purpose of keeping Spanish-language or “urban interest” programming from reaching Americans who live in rural areas.

ACA’s plan does not foster more diverse programming lineups. Rather, it would ensure, by regulatory fiat, that some diverse channels never get the foothold necessary to be seen or heard. And that is exactly ACA’s point. We thus urge ACA to withdraw its proposal and the Commission to roundly reject it.

⁵ See Comments of American Cable Association, MB Docket No. 16-41, at 20 (Mar. 30, 2016).

⁶ See Reply Comments of American Cable Association, MB Docket No. 16-41, at Declaration of Judy Meyka ¶ 6 (Apr. 19, 2016).


⁷ See *Review of the Commission’s Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 47 C.F.R. § 73.658(a), (b), (d), (e) and (g), Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11962-63 (1995) (“[P]roviding licensees with the right to reject network programming ensures that a licensee has the ability to respond to community needs, for example, to cover a late-breaking event of local importance. This concept of control also ensures that ultimate programming decisions are made by the same entity that has responsibility for rule violations.”); see also *Nat’l Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190, 205-06 (quoting Report on Chain Broadcasting, Commission Order No. 37, Docket 5060, at pp. 39, 66 (1941)) (“It is the station, not the network, which is licensed to serve the public interest. . . . We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.”).

⁸ See, e.g., Comments of Aflac Broadcast Group, Inc., MM Docket No. 95-92, at 5 (Oct. 30, 1995) (a Georgia CBS affiliate ran a station-produced program from 11:30 pm to midnight every Friday during the high school football season, which required delaying the start of the Late Show with David Letterman).

⁹ See, e.g., Letter of John Ray, WJHG-TV, MM Docket No. 95-92 (May 30, 1996) (a Florida NBC affiliate aired an annual telethon on behalf of the American Red Cross that required the station to preempt several hours of NBC programming).

¹⁰ See Letter of John Williams, Vice-President and General Manager, WPSD-TV, MM Docket No. 95-92, at 1 (May 29, 1996) (a Kentucky broadcaster preempted Sunday morning network sports events to carry an 11 a.m. church service from their community’s largest church in order to serve elderly viewers who could not travel to church each week).

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs
National Association of Broadcasters